

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

KAISER ALUMINUM FABRICATED PRODUCTS, LLC

Employer

and

Case GR-7-RD-3676

TERRY WICHMAN, An Individual

Petitioner

and

**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC**

Union

APPEARANCES:

Scott A. Faust, Attorney of Boston, Massachusetts, for the Employer

James Bradtke, of Kalamazoo, Michigan, for the Petitioner

Brad Manzollilo, Attorney of Pittsburgh, Pennsylvania, for the Union

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board (NLRB or Board)

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:^{1 2}

¹ The names of the Employer and Union appear as stipulated at the hearing.

² None of the parties filed post-hearing briefs.

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Background:

On May 4 and 7, 2010³, the Employer and Union entered into a recognition agreement for a majority "card check" and a private secret ballot election in a bargaining unit of all employees in the casting, extrusion, die shop, maintenance, and logistic classifications, employed by the Employer at its Kalamazoo, Michigan facility. On May 8, a card check established that a majority of bargaining unit employees supported union representation. On May 26, an election was held, and a majority of employees voted to be represented by the Union. Neither the Employer nor the Union notified the Board of the voluntary recognition. Nor were notices posted at the Employer's facility notifying employees of the voluntary recognition of the Union as the collective bargaining representative of the bargaining unit employees, and their right to file for a NLRB-conducted election within 45 days of notice of the voluntary recognition. On October 12, the Petitioner filed the instant decertification petition.

The issue in this case is whether the decertification petition should be processed or barred pursuant to the recognition bar doctrine as modified in *Dana Corp.*⁴ The Union argues that *Dana Corp.* should be overruled and the decertification petition should be barred for a reasonable period of time to allow the Employer and Union the opportunity to reach their first collective bargaining agreement. The Employer does not take a position in this matter.

Because the parties failed to satisfy the notice requirements established in *Dana Corp.* as more fully discussed below, I find that no recognition bar applies, and the instant petition should be processed.

³ All dates hereafter are 2010, unless otherwise indicated.

⁴ 351 NLRB 434 (2007).

Discussion and Analysis:

The Employer manufactures aluminum rods for use in various manufacturing applications, including the automotive industry. It is a subsidiary of Kaiser Aluminum Corporation. The Employer opened the Kalamazoo facility in 2009 and began hiring in June of that year. At the time of the card check and election, there were approximately 65 bargaining unit employees employed at the facility. At the time that the instant decertification petition was filed, there were approximately 79 unit employees; and at the time of the hearing in this matter, there were approximately 120 unit employees. When fully operational, the Employer anticipates employing 150 bargaining unit employees at the Kalamazoo facility.⁵

Pursuant to the terms of the Employer and Union's recognition agreement, the parties selected an arbitrator to conduct a card check. If the Union established a simple majority of the bargaining unit supported the Union by the presentation of validly signed and dated authorization cards, the arbitrator would then conduct a secret ballot representation election. The parties further agreed that the Employer would voluntarily recognize the Union as the exclusive collective bargaining representative of the unit if a majority of the votes was cast for the Union. The parties' recognition agreement outlined several detailed parameters for conducting the card check and election.

The card check was held on May 8, and established that a majority of the bargaining unit employees supported the Union. The Employer posted a "Notice of Representation Election to Eligible Employees" in the plant, informing employees, among other things, that the non-NLRB election would occur on May 26, 2010. On May 26, the election was held. A majority of the votes was cast for the Union. The arbitrator subsequently issued a tally of ballots, signed by the parties' election observers, indicating that no ballots were challenged or void, with 31 Yes and 31 No ballots cast in favor of union representation. The Employer thereafter recognized the Union based on the election results.

Neither the Employer nor Union notified the NLRB that the Employer voluntarily recognized the Union as the employees' exclusive collective bargaining representative. Neither party posted notices advising employees of the Employer's recognition of the Union as their exclusive collective bargaining representative and their right to file a petition for a Board representation election within 45 days of the notice of voluntary recognition, as required by *Dana Corp.*

⁵ The parties did not raise the expanding bargaining unit as an issue at the hearing.

On June 10, the Union requested bargaining. The Union's bargaining committee included some employees of the bargaining unit. The parties commenced bargaining on August 23.

Between August 23 and September 2, the parties met approximately eight times. On September 2, the parties reached a tentative collective bargaining agreement. Shortly thereafter, the Union presented the tentative agreement to the bargaining unit for a ratification vote. A majority of employees voted against ratification. The petition was filed on October 12.

In *Dana Corp.*, the Board modified the recognition bar doctrine, holding that: "There will be no bar to an election following a grant of voluntary recognition unless (a) affected unit employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days, and (b) 45 days pass from the date of the notice without the filing of a validly-supported petition." *Id.* at 441. The Board further held that "if both conditions are satisfied, the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to engage in negotiations for a first collective bargaining agreement." *Id.* at 441.⁶ With respect to what form the notice was to take, the Board specifically noted that upon being advised by an employer or union that voluntary recognition was granted, the Board would provide the employer with "an official NLRB notice to be posted in conspicuous places at the workplace throughout the 45-day period..." *Id.* at 443.

The *Dana Corp.* Board explicitly addressed voluntary recognition based upon a card-check proceeding, i.e., "card-based recognition" and "card-check recognition" several times. See, for e.g., *Id.* at 434 and 441. The Board is silent with respect to voluntary recognition based on a privately held secret ballot election as that which occurred in the instant case. Nonetheless, I conclude that the same principles that apply to a card check voluntary recognition apply to the facts of this case. The Employer voluntarily agreed to an alternative process to a Board conducted election for recognizing the Union as the bargaining unit employees' exclusive collective bargaining representative. As a result of this voluntary recognition, the criteria set forth in *Dana Corp.* must be satisfied in order for such recognition to be protected through the recognition bar doctrine.

It is undisputed that neither the Employer nor Union notified the Board of the Employer's voluntary recognition of the Union after the privately held election. It is further undisputed that notices were not posted at the facility notifying employees of the voluntary recognition and of their right to file a validly supported petition for a Board election. *Dana Corp.* clearly states that there will be no recognition bar *unless* affected

⁶ The Board also stated that an executed collective bargaining agreement reached on or after the date of voluntary recognition will not bar a petition if the requirements under *Dana Corp.* are not satisfied. *Id.* at 435.

employees receive adequate notice of their rights to file a decertification petition within 45 days of the employer's posting of the Board notice of such recognition, and 45 days pass from the notice posting without a petition being filed. Because such notice was not given in the instant case, there is no recognition bar to the instant decertification petition.

Conclusion:

5. For the reasons stated above, and based on the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees in the following classifications: casting, extrusion, die shop, maintenance, logistics, and KPS leaders employed by the Employer at 5205 Kaiser Drive, Kalamazoo, Michigan, but excluding all quality lab employees, clerical employees, and guards and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 16th day of November, 2010.

“/s/[Stephen M. Glasser].”

(SEAL)

/s/ Stephen M. Glasser
Stephen M. Glasser, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union, AFL-CIO, CLC**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care*

Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **November 23, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlr.gov,⁷ by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of

⁷ To file the list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, www.nlr.gov.

the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **November 30, 2010**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlr.gov**,⁸ but may **not** be filed by facsimile.

⁸ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to **www.nlr.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlr.gov**.

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Union

CASE 7-RD-3676

**Date of Mailing:
November 16, 2010**

CERTIFICATE OF SERVICE OF: DECISION AND DIRECTION OF ELECTION

I, the undersigned employee of the National Labor Relations Board, certify that on the date indicated above I caused the above-entitled document to be served by regular mail, by placing copies into the U.S. Mail, postage paid, addressed to the following persons at the following addresses:

REGULAR MAIL:

Proskauer Rose LLP

Attn: Scott A. Faust, Esq.

One International Place

Boston, MA 02110

Jim Bradtke

32293 Fish Hatchery Road

Kalamazoo, MI 49009

United Steelworkers

Attn: Brad Manzolillo, Esq.

Five Gateway Center, Rm 913

Pittsburgh, PA 15222

Kaiser Aluminum Fabricated Products, LLC

Attn: Dave Kummer

5205 Kaiser Drive

Kalamazoo, MI 49048

Terry Wichman

346 Thomas Street

Allegan, MI 49010

United Steel Workers

615 Luella Court

Kalamazoo, MI 49001

/s/ M. Walsh

M. Walsh, ARD Secretary

Date: November 16, 2010